

**CONTESTED CORPORATE TRANSACTIONS**  
**VOLUME II**

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## Summary of *Investment Canada Act* regime

### 1. Background

- *Investment Canada Act* (ICA) passed in June 1985 to replace the *Foreign Investment Review Act* (FIRA), passed in 1974
- over time FIRA became to be seen as a barrier to foreign investment
- ICA reflects a new approach
  - Purpose of the ICA is to “encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities ...”

### 2. Does the ICA apply

- two basic questions in an acquisition:
  - is the acquiror a non-Canadian?
  - is its proposed investment an acquisition of control of a Canadian business?
- acquisition of control of a Canadian business
  - two types of acquisitions:
    - direct - acquisition of voting shares or interests in the entity carrying on the Canadian business or all or substantially all the assets of the entity used in carrying on the Canadian business
    - indirect - acquisition of voting shares or interests in an entity which controls another entity carrying on the Canadian business
  - presumptions respecting acquisition of control
    - acquisition of a majority of voting shares or interests is deemed to be an acquisition of control
    - acquisition of less than a majority of voting interests of an entity other than a corporation is deemed not to be an acquisition of control
    - acquisition of less than a majority but more than one-third of the voting shares of a corporation is presumed to be an acquisition of



control unless it can be shown that the corporation is not controlled in fact by the acquiror

### 3. Notifiable or Reviewable

- notifiable:
  - investment to establish a new Canadian business
  - investment to acquire control of a Canadian business unless it is reviewable
  - acquiror must file a notice within 30 days after the investment is implemented
  - a notifiable investment is not reviewable unless it is “cultural”
- reviewable:
  - reviewable investment requires Ministerial approval before it can go ahead
  - must be able to demonstrate “net benefit” to Canada
  - investment to acquire control is reviewable where the value of the assets acquired (in an asset deal) or the assets of the entity carrying on the Canadian business (including other entities in Canada control of which is being acquired) exceed a specific dollar threshold - now \$237 million for WTO investors; for non-WTO investors, the threshold is \$5 million
  - indirect acquisitions of a Canadian business where a foreign corporation is acquired are not subject to review where the investment is made by or the seller is a WTO investor; for non-WTO investors, the threshold for an indirect acquisition is \$50 million
- application for review must include:
  - financial and other information about the acquiror and the Canadian business
  - a description of the investor’s plans for the Canadian business with specific reference to the following factors:
    - the effect of the investment on the level and nature of economic activity in Canada
    - the degree and significance of participation by Canadians in the business



- the effect of the investment on productivity and competition
- the compatibility of the investment with national industrial, economic and cultural policies
- the contribution of the investment to Canada's ability to compete in world markets
- review period is 45 days but can be extended for a further 30 days
- generally as a condition to approval, the government will require undertakings related to:
  - employment
  - head office
  - board members
  - senior management
  - capital expenditures
  - research and development
  - exports

#### **4. Exemptions from ICA**

- several exemptions available:
  - lender exercising security
  - corporate reorganization
  - transaction involving the establishment of a foreign bank or a banking or insurance business

#### **5. Cultural Business**

- a cultural business means a Canadian business that carries on any of the following activities, namely:
  - the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers
  - the production, distribution, sale or exhibition of film or video recordings
  - the production, distribution, sale or exhibition of audio or video music recordings

- the publication, distribution or sale of music in print or machine readable form, or
- radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services

## **6. Confidentiality**

- all information related to an application remains privileged and is not obtainable under access to information legislation
- limited disclosure permitted of names of parties; in some circumstances, undertakings may be made public

## **7. Guidelines**

- related business:
  - expansion of an existing business or establishment of a related new Canadian business is not subject to review or notification
  - if unrelated or related but cultural then notification is required
- defunct business:
  - a business that has closed permanently or been abandoned or a business being liquidated does not constitute a business
- part of a business:
  - a business that is capable of being carried on as a separate business is subject to the ICA even though it may not constitute all or substantially all of the assets of the relevant entity
  - also, the ICA deems a Canadian business to be carried on in Canada even though it is carried on partly in Canada and partly outside Canada



